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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CARL P. MCDONOUGH,	)	No. C 07-3087 MMC
	)	
Plaintiff,	)	<b>ANSWER OF UNITED STATES OF</b>
	)	<b>AMERICA</b>
v.	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Defendant UNITED STATES OF AMERICA, by and through counsel, hereby answers and otherwise respond to plaintiff Carl McDonough's complaint filed June 13, 2007, as follows:

**SPECIFIC RESPONSES TO PARAGRAPHS IN THE COMPLAINT**

1. This paragraph alleges the subject matter jurisdiction of this Court, to which no response is required.
2. The first sentence of this paragraph is an allegation of the plaintiff's residency, to which defendant has insufficient information to admit or deny. Defendant avers on information and belief that plaintiff is not the only surviving son of Carl A. McDonough. The second sentence is admitted as to the date of death but denied

1 as to the remainder of the sentence because defendant is without sufficient  
2 information to admit or deny.

3 3. Admit that between March 14, 2005 and November 6, 2005, decedent had been  
4 admitted to the Livermore care facility of the Veterans Affairs Palo Alto Health  
5 Car System in Livermore, California. Admit that decedent was receiving  
6 treatment for a left humerus fracture and other multiple medical conditions at the  
7 Livermore VA Nursing Home Care Unit. Defendant is without sufficient  
8 information to respond to the allegation that decedent was admitted while  
9 awaiting completion of renovations to decedent's home. Admit that decedent  
10 received medical care at the Livermore VA NCHU, which is a component of the  
11 VA Palo Alto Health Care System, a medical arm of the U.S. Department of  
12 Veterans Affairs. Defendant denies the remainder of the allegations in this  
13 paragraph.

14 4. Admit that during admission to the Livermore facility, decedent's treating  
15 physicians ordered Coumadin. Except as to that limited admission, defendant  
16 denies the remainder of this paragraph, because it alleges a legal conclusion for  
17 which no response is required.

18 5. This paragraph states plaintiff's legal contentions to which no response is  
19 required. To the extent that a response is required, defendant denies the  
20 allegations in this paragraph.

21 6. Deny.

22 7. Admit that plaintiff filed a Standard Form 95, "Claim for Damage, Injury or  
23 Death," that was received in the Office of the VA Regional Counsel in San  
24 Francisco, California on June 10, 2006. Defendant denies the remainder of the  
25 paragraph.

26 **SPECIFIC RESPONSES TO PLAINTIFF'S PRAYER**

27 The remainder of plaintiff's complaint constitutes a prayer for relief to which no response  
28

1 is required. To the extent that a response is required, defendant denies that plaintiff is entitled to  
2 any relief whatsoever.

### 3 AFFIRMATIVE DEFENSES

- 4 1. Plaintiff fails to state a claim upon which relief may be granted.
- 5 2. Any injury or loss to plaintiff was not proximately caused by any negligent or  
6 otherwise wrongful act or omission of any employee or agent of the United States.
- 7 3. Plaintiff's claims herein are subject to the limitations contained in the California  
8 Medical Injury Compensation Recovery Act ("MICRA"), Cal. Civil Code §§  
9 3333.1 et seq.
- 10 4. Defendant did not breach any cognizable duty owed to Plaintiff.
- 11 5. In the event that Defendant is found negligent, which negligence Defendant  
12 denies, such negligence is not the cause in fact or proximate cause of alleged  
13 damages suffered by Plaintiff.
- 14 6. To the extent plaintiff may have failed to mitigate his damages herein, any  
15 recovery or other award to plaintiff must be reduced accordingly.
- 16 7. Attorney's fees are taken out of the judgment or settlement at a rate determined  
17 and governed by statute. 28 U.S.C. § 2678.
- 18 8. Defendant is not liable for interest prior to judgment or punitive damages. 28  
19 U.S.C. § 2674.
- 20 9. Any recovery by Plaintiff is subject to the availability of appropriated funds. 42  
21 U.S.C. § 233(k).
- 22 10. Plaintiff's right to sue the United States is limited to the extent of waiver of  
23 sovereign immunity and the administrative requirements set forth in the Federal  
24 Tort Claims Act, 28 U.S.C. § 2671 *et seq.*
- 25 11. Plaintiff is not entitled to a trial by jury, under 28 U.S.C. § 2402.
- 26 12. Plaintiff is limited to the amount set forth in the administrative claim. 28 U.S.C. §  
27 2675(b).

- 1 13. Plaintiff's claims are barred by the applicable statute of limitations.
- 2 14. The negligence of third parties reduces or bars plaintiff's recovery.
- 3 15. Defendant's agents and employees acted at all times within the applicable
- 4 standard of medical care.
- 5 16. Third party conduct was a superceding, intervening cause of any damages claimed
- 6 by plaintiff.
- 7 17. To the extent that plaintiff seeks to recover for any occurrence or result that was
- 8 caused by the natural course of plaintiff's preexisting disease or condition, or that
- 9 was the natural or expected result of reasonable treatment rendered for that
- 10 disease or condition, Plaintiff is precluded from obtaining any recovery in this
- 11 action by the terms of Cal. Civil Code § 1714.8.
- 12 18. Some or all of plaintiff's claims are so speculative in nature that they should be
- 13 dismissed.
- 14 19. California allows defendants in medical malpractice actions to offer evidence of
- 15 the plaintiff's receipt of payments in connection with the injury in the form of
- 16 social security benefits, workers' compensation, health insurance, accident
- 17 insurance, or any other contract providing for health care. Cal. Civ. Code §
- 18 3333.1 (West 2006).
- 19 20. Some or all of plaintiff's damages claims are not allowed under California law,
- 20 including but not limited to Cal. Civ. Code § 3333.4 (West 2006).
- 21 21. Plaintiff voluntarily assumed the risks of the medical procedure that forms the
- 22 basis of his complaint.
- 23 22. Defendant's agents and employees provided all information material to the
- 24 plaintiff relating to the risks of the medical procedure that forms the basis of his
- 25 complaint, and plaintiff agreed to the medical procedure based on informed
- 26 consent.

27 WHEREFORE, Defendant the United States of America prays for relief as follows:

1. That plaintiff take nothing by his complaint;
2. For costs of suit, including attorney's fees, if appropriate;
3. And for such other relief as the Court may deem proper and necessary.

DATED: August 17, 2007

Respectfully submitted,

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